

Issues, Options, and Potential Pathways for the Development Incentives Provisions

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Executive summary

- 1 The Council has initiated a review of the Development Incentive provisions in the Operative Kapiti Coast District Plan 2021 (the District Plan). The provisions under review are the objectives, policies, rules and Guideline that refer or are relevant to development incentives.
- 2 The scope of the review was to consider the provisions in respect of their implementation, issues identified to date, the current wider legislative and statutory planning framework and contemporary planning practice.
- 3 This review has identified several issues with the Development Incentive provisions, including:
 - The lack of certainty of the provisions
 - Inconsistency with the tests for restricted discretionary activities
 - The notice of intention process is ultra vires
 - That a discretionary judgement is required in order to determine activity status
 - The presumption of non-notification in the guideline
 - Changes in energy efficiency measures mean that some of the incentives available are obsolete
 - Changes to the Resource Management Act 1991 and the introduction of the National Policy Statement on Urban Development mean that some of the incentives available are no longer relevant or appropriate, in particular in respect to the new medium density residential standards, intensification provisions and removal of minimum parking requirements
 - Changes to higher order planning documents have clarified roles and functions between the Greater Wellington Regional Council and Kapiti Coast District Council, with water quality and aquatic biodiversity falling within a regional council's functions
 - The Proposed Natural Resources Plan includes rules for stormwater treatment, making the incentives a double dip
 - The Council has released its [Growth Strategy](#), which seeks to reduce the fragmentation of rural productive land. Providing for a doubling of density is inconsistent with this outcome. It is also on the face of it inconsistent with the Plan's objectives for Rural land.
 - The Council has adopted its [Open Space Strategy](#), which sets out the Council's open space vision for Kāpiti. Any amendments to the Development Incentive

provisions should reflect the outcomes sought in that document, including the acquisition of new open space and connections and linkages between areas of open space.

- The Incentives for planting apply district-wide and do not prioritise the enhancement of underrepresented indigenous ecosystems, meaning the current approach could reward enhancement in areas where it is not comparatively ecologically beneficial.
 - The points system is complex and complicated to navigate and implement.
- 4 The other issue that has been identified is the lack of requirements or incentives provided in the District Plan to protect existing indigenous vegetation when subdividing land. This is inconsistent with the Council's requirement to protect and maintain indigenous biodiversity and should be rectified.
 - 5 The review of contemporary district plans did not identify any that use the type of incentives provisions contained in the District Plan. Rather, they focus on the protection of significant indigenous biodiversity (to maintain indigenous biodiversity), historic heritage items or landscape areas. Those that contain incentive provisions are also clearer, more certain and easier to administer.
 - 6 This paper concludes with recommended options for inclusion in a plan change process, including removing the guideline entirely and improving the rule framework. Other options that go beyond the existing incentives themselves are also identified.

Introduction

- 7 On 21 October 2021, the Kapiti Coast District Council's Strategy and Operations Committee resolved to endorse a package of omnibus plan changes to the District Plan.¹
- 8 One of those plan changes was Plan Change 1E, to review and amend the development incentive provisions.
- 9 The purpose of this paper is to:
 - (i) provide an overview of the provisions.
 - (ii) present the findings of an independent planning review of the development incentive provisions to identify issues.
 - (iii) consider the best contemporary practice from other district plans, and the current wider legislative and statutory planning framework directives.
 - (iv) identify potential options for Plan Change 1E that may address the identified issues with the existing provisions

¹ Report available at:

https://kapiticoast.infocouncil.biz/Open/2021/10/SAOCC_20211021_AGN_2321_AT_WEB.htm

Overview of the Development Incentives Framework

10 The October 2021 report to the Strategy and Operations Committee provides a succinct overview of the Development Incentives Framework. Paragraphs 22 – 26 from that report are repeated below.

22. Development incentive provisions were established for environmental sustainability goals. The development incentives guidelines provide the following reason why they are included in the District Plan:

The Council is keen to support those landowners and land developers who are prepared to go 'above and beyond' standard levels of resource management practice in carrying out activities. The Council considers that such actions should be recognised with additional development rights. While the Council already provides some non-regulatory financial incentives for some activities (e.g. heritage fund, rates relief etc), the Council considers there is scope to use regulatory-based incentives as well.

23. As part of the 2012 Proposed District Plan (the PDP), the Kapiti Coast District Council (the Council) incorporated incentives for environmental sustainability likely to create a net benefit for the environment in the following three focus areas:

- (a) biodiversity,
- (b) water quality, and
- (c) energy efficiency and generation.

24. The incentives/rewards potentially available for qualifying development include:

- (a) additional subdivision lots,
- (b) creation of additional residential unit on a site,
- (c) additional building coverage,
- (d) additional building height,
- (e) reduced on-site car parking requirements.

25. Under the RMA, these additional development rights could not simply be granted via the District Plan. An assessment on the effects on the environment and any affected parties is still required, on a site-by-site basis, through the resource consent process. This means the proposed use of the development incentive provisions does not guarantee an applicant will be granted resource consent.

26. The District Plan provisions were therefore largely written as guidance within the District Plan to signal these rewards are appropriate for development practice that went 'above and beyond' in the three focus areas. A relatively complicated points-based system was included in the guidelines for development incentive activities which could be accumulated to gain enough points to qualify for applying for a resource consent under the development incentive rules.

11 A background to the Development Incentive provisions is set out in Appendix A.

Rationale for the review

- 12 The October 2021 report to the Strategy and Operations Committee set out the rationale for the review. Paragraphs 29 and 30 from that report are repeated below.

29. With the focus of existing and emerging national direction on urban development, housing affordability, and the protection of highly productive land, wetlands and indigenous biodiversity, it is appropriate timing to review the development incentive provisions to ensure they are efficient, effective, and not contrary to existing and emerging national direction.

30. In addition, there are also specific drivers for this review arising from the District Plan itself (section 3.4.5 of the development incentive guidelines), which anticipates a five-yearly review of the development incentive programme; the identification of implementation matters which came to light during the appeals process on the then “proposed” District Plan in 2019, and the identification of additional implementation issues since the District Plan became operative.

Issues with the Development Incentives Framework

- 13 The following section of this paper builds and expands on the legal and practical issues with the Framework identified in paragraph 27 of the October 2021 report to the Strategy and Operations Committee, as well as identifying some issues not contained in that report.

Certainty

- 14 The development incentive rules in the District Plan include the condition that they apply to *“Development which is undertaken in accordance with the Development Incentives Guidelines”*. *“In accordance with”* imports a significant degree of judgement, particularly where the guidelines themselves are quite broad in scope and are not necessarily worded in a manner that provides certainty about whether an application meets the guidelines. It is uncertain exactly which parts of the Guidelines are *“to be undertaken in accordance with”*, meaning a plan user is not certain as to what the rule requires in order to comply with it.
- 15 The wording of some standards in some rules is also unclear. Some rules include a standard which states *“the amount of development proposed must not exceed or proceed earlier than the stipulations in the guideline”*, while SUB-RES-R29 states *“Subdivision under this rule must comply with all other standards unless otherwise specified in Appendix 1”*.
- 16 It is unclear which *“stipulations”* and *“other standards”* these standards refer to, and it is therefore unclear as to how that standard is to be complied with. For example, the use of *“proceed earlier”* suggests a reference to the timing requirements set out in the Guidelines, but it is not clear how one could *“exceed”* those timing requirements,

causing doubt if it is those timing requirements being referred to. The result is that the criteria for compliance with the rule are unclear.

Meeting the RMA requirements for restricted discretionary activities

- 17 All of the rules in the District Plan relating to Development Incentives have restricted discretionary activity status. Pursuant to section 77B(4) of the RMA, if an activity is classed as a restricted discretionary activity, the local authority “*must specify in the rule the matters over which it has restricted its discretion in relation to the activity*” [emphasis added]. Under section 104C, the consent authority’s discretion whether to grant or refuse consent and the imposition of conditions on a grant of consent is then limited to matters stated in the rule.
- 18 There are provisions in the Guidelines that go beyond what is set out in the matters of discretion in the rules themselves:
- In terms of the development site, at 3.1(vii) the Guidelines state that “*it will be within the discretion of the Council*” to determine whether an exception applies and the activities can be carried out beyond the development site”. It is unclear whether this matter falls within the matters of discretion in the rules themselves or not.
 - At 3.2.1 under “*Council assessment of proposals*”, the Guidelines state “*council will need to expand its usual considerations by assessing whether the activity carried out meets the criteria for the incentive development activity*”. This appears to suggest the Council intends to consider matters beyond the matters of discretion set out in the relevant rules.
- 19 If the provisions set out above go beyond the matters of discretion set out in the rules, this approach would be inconsistent with section 77B of the RMA.

Activity Status, Legal Status and Notices of Intention

- 20 As currently worded, the provision of pre-application notices of intention appears to be ultra vires, based on the principle that a rule must specify the activities that are expressly allowed subject to the grant of consent.
- 21 The notice of intention process is set out at 3.1 of the Guidelines. The wording at 3.1(iii) appears to be ultra vires:
- This process will be necessary where a landowner or developer proposes to take advantage of any development incentive that involves planting...
 - Accordingly, any potential applicant needs to notify the Council that it is starting a planting programme with a view to having it accepted at a future time under the incentives programme. A letter will be sufficient, to be followed up by a meeting

with the Council to confirm that the planting management plan will meet the criteria needed for the incentive [emphasis added].

- 22 The issue with the underlined text is that the status of the activity cannot be determined from reading the plan itself; instead, it requires the lodgement of a notice of intention and then confirmation from the Council (exercising a discretionary judgement) that the planting management plan is acceptable to it.
- 23 A similar issue arises with the rules that apply to “Development which is undertaken in accordance with the Development Incentives Guidelines ...”. A discretionary judgement is required in order to determine activity status, rather than that status being clear on the face of the rules.
- 24 There is also uncertainty as to what the legal status of notices of intention is. Notices of intention are intended to address the time delay between implementing a planting programme, and actually being able to benefit from a planting incentive (since development incentives relating to planting activities only become available where the planting has been established for a period of at least three years). To address this time delay, an applicant can notify the Council that it intends to seek to obtain a planting-based incentive by lodging a notice of intention. Therefore, the intention appears to be a means to facilitate a discussion between the Council and applicant as to what is required to qualify for the incentive, to assist with compliance with the relevant provisions. However, given that the result of a notice of intention (if confirmed by the Council) is to determine activity status, the legal status of notices of intention is currently unclear.
- 25 The use of the term “development right” in the Guidelines may also be ultra vires, in particular because doing so creates an expectation on the part of developers that the Council is committed to granting consent.

Presumption of non-notification

- 26 The guidelines seek to influence notification decisions under s95 of the RMA. The guidelines state that when a resource consent for the additional development right is considered “*The activity will generally be non-notified. It is expected that the involvement of third parties in these types of applications will however be limited, as reducing the likelihood of third party involvement was a consideration in selecting the type of incentives to be offered in the Plan.*” This part of the guideline is in conflict with provisions of the RMA. Under the RMA, rules may preclude public or limited notification, but the Council may still notify an application if it considers there are special circumstances. The rules in the District Plan itself do not preclude either public or limited notification.
- 27 The guidelines also state *in most cases, a restricted discretionary activity resource consent will be required to ensure that the effects of the proposed activity, including any effects resulting from a development incentive, can be properly assessed by the Council to ensure it still meets the requirements of the RMA.* This suggests there may be

effects arising from the activity itself, such as subdivision using the incentives, that may generate effects on the environment that are either minor or more than minor. In contrast to what the guidelines state about general non-notification, it is noted these levels of effects regularly affect third parties.

Changes in energy efficiency measures

- 28 The provisions which offer development incentives in exchange for installation of energy efficient appliances in houses are dated and open to interpretation. There is no baseline target on energy efficiency ratings appliances must meet to qualify for a development incentive. Since technological improvements have been made in the energy efficiency of appliances since 2012, development incentives under the guidelines may be available for appliances which are now standard technology in 2022. This fails to reward those going 'above and beyond'. Another challenge with these provisions is the difficult in monitoring the on-going use of 'energy efficient' appliances beyond the time which resource consent is granted.

Changes to the Resource Management Act 1991

- 29 The RMA was amended in 2017 through the Resource Legislation Amendment Act 2017 to introduce new procedural principles in section 18A. This section is set out below:

Every person exercising powers and performing functions under this Act must take all practicable steps to—

- (a) use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions or powers being performed or exercised; and*
- (b) ensure that policy statements and plans—*
 - (i) include only those matters relevant to the purpose of this Act; and*
 - (ii) are worded in a way that is clear and concise; and*
- (c) promote collaboration between or among local authorities on their common resource management issues.*

- 30 The development incentives approach needs to be considered in light of these procedural principles, particularly in ensuring that they are consistent with the functions of the Council and are clear and concise.
- 31 The RMA was amended at the end of December 2021 through the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021. This Act, amongst other matters, requires the Council to amend its District Plan by notifying a plan change no later than 20 August 2021 to:
- introduce new mandatory medium density residential standards (MDRS) into all relevant residential zones
 - give effect to policy 3 of the National Policy Statement on Urban Development 2020 (NPS-UD).
- 32 The new MDRS will make it a permitted activity to construct three residential dwellings on a site, to up to three-storeys, subject to compliance with set density standards. The

intent of this change is to encourage intensification in existing residential areas and will result in a much denser and higher urban form than is currently permitted in the District Plan.

33 Two of the significant changes is that it allows dwellings up to 11 metres in height (with an extra allowance of 1m in certain circumstances) and building coverage up to 50%. The District Plan generally permits height to 8m and building coverage at 40%. Given these amendments and the new permitted baseline they generate, it is considered necessary to review the incentives available for energy efficiency and on-site generation to determine if they are still appropriate.

34 The NPS-UD is addressed below.

Changes to higher order planning documents

35 The development incentive provisions were first drafted and notified in 2012, with appeals resolved in 2019. During this time:

- Two new National Policy Statements have been produced by the Ministry for the Environment, being the NPS-UD and National Policy Statement on Freshwater Management 2020 (NPS-FM).
- A new National Environmental Standard for Freshwater (NES-F) has been promulgated which establishes nationwide regulations in respect to wetlands, amongst other matters.
- The Proposed Natural Resources Plan (PNRP) has gone through the RMA process and is nearing being made operative, with only four consent orders waiting to be agreed by the Court.
- The Regional Policy Statement for Wellington (RPS) was made operative in 2013. This sets out clear responsibilities around water quality and aquatic biodiversity, as well as including policies directing indigenous biodiversity and energy efficiency.
- The Council has released its Growth Strategy 2022, promulgated under the Local Government Act.
- The Council has released its Open Space Strategy 2022, promulgated under the Local Government Act.

National Policy Statement on Urban Development

36 Policy 3 of the NPS-UD requires that Tier 1 councils amend their district plans to enable

- (a) in city centre zones, building heights and density of urban form to realise as much development capacity as possible, to maximise benefits of intensification; and*
- (b) in metropolitan centre zones, building heights and density of urban form to reflect demand for housing and business use in those locations, and in all cases building heights of at least 6 storeys; and*
- (c) building heights of at least 6 storeys within at least a walkable catchment of the following:*
 - (i) existing and planned rapid transit stops:*
 - (ii) the edge of city centre zones:*

- (iii) the edge of metropolitan centre zones; and*
- (d) within and adjacent to neighbourhood centre zones, local centre zones, and town centre zones (or equivalent), building heights and density of urban form commensurate with the level of commercial activities and community services.*

- 37 As with the new MDRS, this will result in a significantly changed permitted baseline for development than is what is currently in the District Plan and also applies to commercial and industrial areas. For the same reason as the MDRS, it is considered necessary to review the incentives available for energy efficiency and on-site generation and water quality to determine if they are still appropriate.
- 38 Policy 11 of the NPS-UD requires that Tier 1, 2 and 3 councils district plans do not set minimum car parking rate requirements and required that any such rules be removed from District Plans.² This means incentive 2.3 in respect of water quality for commercial and industrial developments that provides for a reduction in parking spaces on business zoned land is no longer relevant.

National Policy Statement for Freshwater Management

- 39 Objective 1 of the NPS-FM sets a new outcome for freshwater management, whereby natural and physical resources are managed in a way that prioritises:
- (a) first, the health and well-being of water bodies and freshwater ecosystems*
 - (b) second, the health needs of people (such as drinking water)*
 - (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.*
- 40 Regional councils are required to amend their plans to give effect to this objective and supporting policies in a manner consistent with the implementation provisions of the NPS-FM. They have until 31 December 2024 to notify freshwater planning instruments which give effect to the NPS-FM.
- 41 Amongst other matters, the NPS-FM requires:
- Policy 5** Freshwater is managed through a National Objectives Framework to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved.
- Policy 6:** There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.
- Policy 9:** The habitats of indigenous freshwater species are protected.
- 42 The new freshwater planning instrument is likely to be in the form of a change to the PNRP. It will introduce new provisions that will address freshwater quality and aquatic

² Minimum car parking requirements were removed from the Operative Kapiti Coast District Plan on 17 February 2022. For more information please see: <https://www.kapiticoast.govt.nz/your-council/forms-documents/district-plan/removal-of-minimum-car-parking-standards/>

ecosystem health, beyond what is already contained in the PNRP. There is potential that the current development incentives (and other provisions within the District Plan) will not be consistent with future changes, particularly where these fall outside of the Council's functions under the RMA.

National Environmental Standard for Freshwater

- 43 The NES-F introduces new regulations that manage vegetation clearance, earthworks and land disturbance and any taking, use, damming, diversion, or discharge of water within defined setbacks from natural wetlands. The impact of these regulations on the development incentives needs to be considered to avoid any conflict; for instance if any vegetation clearance is proposed in proximity to a wetland in order to undertake enhancement planting to obtain an incentive.

Regional Policy Statement

- 44 The RPS became operative in April 2013.
- 45 There are some relevant policies in the RPS in respect of the Development Incentives provisions
- 46 Policy 11: Promoting energy efficient design and small scale renewable energy generation – district plans is relevant in respect to the energy efficiency provisions.
- District plans shall include policies and/or rules and other methods that:*
- (a) promote energy efficient design and the use of domestic scale (up to 20 kW) and small scale distributed renewable energy generation (up to 100 kW); and*
 - (b) provide for energy efficient alterations to existing buildings.*
- 47 This policy is implemented through the ENGY – Energy Chapter in the PDP.
- 48 In respect to stormwater treatment and water quality, policy 12: Management purposes for surface water bodies and policy 14: minimising contamination in stormwater from new development are both regional plan policies. These are implemented through the PNRP.
- 49 Policy 61 sets out the relevant responsibilities for indigenous biodiversity:
- GWRC has the primary responsibility for the control of the use of land to maintain *and enhance* indigenous ecosystems in water bodies (including wetlands) and coastal water.
 - District and city councils in the Wellington region have primary responsibility for controlling the use of land to *maintain* indigenous biological diversity (other than in the coastal marine area and the beds of lakes and rivers) through the creation of objectives, policies and rules in their district plans.
- 50 This policy approach is consistent with section 31 of the RMA, functions of territorial authorities, which in (1)(b)(iii) includes the control of any actual or potential effects of

the use, development, or protection of land [emphasis added], including for the purpose of the maintenance of indigenous biological diversity.

- 51 In contrast, section 30 of the RMA in (1)(c)(ii) and (iii) includes the control of the use of land for the purpose of:
- The maintenance and enhancement of the quality of water in water bodies and coastal water
 - the purpose of the maintenance and enhancement of ecosystems in water bodies and coastal water
- 52 Section 31(ga) also includes the maintenance of indigenous biological diversity.
- 53 Supporting this, policy 18: Protecting aquatic ecological function of water bodies and policy 19: Managing amenity, recreational and indigenous biodiversity values of rivers and lakes are both regional plan directed policies.
- 54 Policy 24: protecting indigenous ecosystems and habitats with significant indigenous biodiversity values is both a district and regional plan policy, which is consistent with policy 61 and sections 30 and 31 of the RMA.
- 55 DO-O2 *Ecology and Biodiversity*, and NE-P4 *Incentives* in the ODP refer to the protection and enhancement of aquatic ecosystems.
- 56 In respect to indigenous biodiversity, the distinction between the regional and district council functions is that GWRC is responsible for indigenous ecosystems (and their maintenance and enhancement), whereas the Council has responsibility for terrestrial biological diversity (and its maintenance and protection). This raises potential *vires* issues, as DO-O2 and NE-P4 in the ODP currently refer to enhancement of indigenous ecosystems. The development incentives focus on the enhancement of aquatic biodiversity is also questionable as to *vires*. This needs to be carefully considered particularly in terms of section 18A, procedural principles, of the RMA.

Proposed Natural Resources Plan

- 57 The PNRP has introduced new rules relating to stormwater treatment and water quality, meaning that providing incentives for stormwater treatment would be effectively providing a bonus for what already is a regional council requirement. It is recommended that any incentives that relate to stormwater treatment be removed.

Reference to water quality in the Incentives

- 58 There are references throughout the relevant provisions in the District Plan to water quality, and the Development Incentive Guidelines themselves include several sections on water quality incentives.

59 The focus of the incentives set out at 2.3 of the Guidelines, currently titled “*Water quality activity and incentives*”) appears to be largely focused on enhancement planting and stormwater treatment, rather than just water quality. In most cases, water quality seems to be a secondary benefit, and not the primary focus of the incentives set out under that heading. The use of the term “water quality” does not accurately reflect what the incentives themselves actually seek to manage. As outlined above, contamination in stormwater and water quality are both regional council functions.

Te Tupu pai – Kapiti Growth Strategy

60 In March 2022, the Council released its Growth Strategy, Te tupu pai Growing well, which sets out a vision and roadmap for how Council and Mana Whenua will work to achieve sustainable development for the district to 2051.

61 The key relevant actions set out in the Growth Strategy that relate to the appropriateness of the Development Incentives are:

How we will grow includes

- *Growing both up and out, with an emphasis on intensification and opening up some greenfields progressively over time, with our greenfields development also being denser and more connected into public transport*
- *Protecting, enhancing and living sensitively with our beautiful whenua, wai and green spaces (those naturally occurring and those that have been developed for recreation)*
- *Integrating spaces for business and industry and protecting our highly productive rural land”³*

We still have space to develop – in our existing urban centres and on their edges...and can carefully manage how and where we do that. That means we can accommodate a bigger population while retaining what make Kapiti special – preserving our green, rural and open spaces and protecting and enhancing our waterways and coastline⁴

62 The Rural section is of particular relevance. This is set out in full below:

A significant area of the Kāpiti Coast is used for farming and horticulture (particularly around Ōtaki, Te Horo and Hautere where there is high-quality soil for growing). In recent years, subdivision of rural land for housing has increased, mostly on the fringes of urban areas, although this has been somewhat managed through the district plan.

We will also continue to provide for some rural residential living – on larger blocks of land – as part of the mix of housing in our district.

³ Page 8

⁴ Page 10

The strategy recognises that this is part of the character of Kāpiti and that those areas contribute to our green spaces overall.

Our approach to growth aims to minimise the further fragmentation of productive rural land by setting out areas for future housing right through until 2051. This may involve tightening-up the current subdivision provisions in our most productive rural areas where the land has not already been significantly fragmented.

We may also explore the possibility of incentivising re-amalgamation of subdivided land where feasible.

Our overall focus on intensification, in both our urban areas and greenfields developments, supports our emphasis on protecting productive land. Our strategy aims for all our land – urban and rural – to be used well.

- 63 In terms of biodiversity, the Growth Strategy seeks *a mix of intensification and greenfield expansion that provides enhanced green and blue networks through the district (land and waterways)*.⁵

Open Space Strategy

- 64 The Council's Open Space Strategy was adopted in March 2022. The vision for the Council's open space is:

Connecting the community with a vibrant, diverse, thriving and interconnected open space network, enhancing the mauri of both"⁶.

- 65 The Strategy includes ten priorities, with those relevant being:

1. *Protecting, restoring, connecting and enhancing the natural environment*
2. *Supporting connectivity across open spaces*

- 66 The Strategy identifies opportunities for the open space network to grow, which includes through land acquisition and the taking of esplanade reserves and strips through subdivision.

- 67 It is appropriate that the Development Incentives are reviewed to ensure that they are consistent with and reflect the outcomes Council seeks to achieve in respect to its Open Space Strategy. There are potential opportunities to provide for bonuses where the outcomes of the Open Space Strategy are being achieved, such as new open space and connections/linkages between existing areas of open space.

District-wide approach to incentives for planting

- 68 The development incentives currently apply across the District. With respect to the biodiversity enhancement incentives, there is a question as to whether the incentives should be more focused to ensure they are directed at the most underrepresented

⁵ Page 37

⁶ Page 3

indigenous ecosystems in the District, where enhancement could significantly contribute to maintaining and enhancing indigenous biodiversity values. This would ensure incentives are not offered for development in areas where there is no threat to, or underrepresentation of indigenous ecosystems. The current district-wide approach could be rewarding enhancement in parts of the District where it is not comparatively ecologically beneficial.

The extent of bonuses provided for and whether these would achieve the Plan's objectives

69 Section 2.1 of the Guideline states that there is an exception:

for rural zoned land which is of sufficient area to be subdivided into two or more new lots as a restricted discretionary activity. In that case more than one incentive is available if multiples of 100 points are earned, for example by the creation of 4 or 6 hectares of ecological corridor, but with an upper limit of twice the density (or half of the minimum average lot size) for the zone.

70 While the Guideline is not a rule, the relevant subdivision rules as drafted have the condition that “the amount of development proposed must not exceed or proceed earlier than the stipulations in the guideline”. This uncertainty and lack of clarity has been addressed earlier. That the Guideline states that an upper limit of twice the density for the Rural Zone may be achieved may be seen as an absolute rather than a matter over which there is discretion. Further, there is no guidance provided on how to exercise discretion as to where that upper limit may be appropriate.

71 Subsequently, when considering a subdivision application in the Rural Zone for incentives, there are 13 matters of discretion against which a consent may be considered. While one of these matters is “visual, character and amenity effects”, the matters do not allow consideration against some of the key outcomes sought for the District's rural zones. In particular, DO-O6 has an outcome of:

To sustain the productive potential of land in the District, including:

- 1. retaining land which is suitable for a range of primary production activities;*
 - 2. achieving added economic and social value derived from primary production activities through ancillary on-site processing and marketing;*
 - 3. enabling activities that utilise the productive potential of the land in the rural environment;*
 - 4. reducing conflict between land uses in the rural environment and adjoining areas; and*
 - 5. avoiding, remedying or mitigating adverse effects on the efficient operation of existing primary production activities from sensitive activities establishing on adjoining subject sites;*
- while safeguarding the life-supporting capacity of air, water, soil, and ecosystems by avoiding, remedying or mitigating adverse effects on the environment.*

72 DO-O11, Character and amenity values, is also relevant [emphasis added]:

To maintain and enhance the unique character and amenity values of the District's distinct communities so that residents and visitors enjoy:

1. *relaxed, unique and distinct village identities and predominantly low-density residential areas characterised by the presence of mature vegetation, a variety of built forms, the retention of landforms and unique community identities;*
2. *vibrant, lively town centres supported by higher density residential and mixed use areas;*
3. *neighbourhood centres, village communities and employment areas characterised by high levels of amenity, accessibility and convenience;*
4. *productive rural areas, characterised by openness, natural landforms, areas and corridors of indigenous vegetation, and primary production activities;*
and
5. *well managed interfaces between different types of land use areas (e.g. between living, working and rural areas and between potentially conflicting land uses, so as to minimise adverse effects.*

73 Supporting policies in the Rural Zones include:

- Maintaining and enhancing rural character, including low density of development and a predominance of primary production activities (GRUZ-P2, RPROZ-P2)
- Providing for primary production activities as the principal use (RPROZ-P1)
- Management of conflicting uses between activities on adjacent sites and sensitive activities, in particular the effects on the operation of rural activities (GRUZ-P5 and GRUZ-P6, RPROZ-P5 and RPROZ-P6)
- Avoiding land being used for urban development or rural lifestyle development where it would compromise primary production activities, reduce rural character, etc (GRUZ-P7)

74 The relevant objectives for the development incentives are DO-O2 and DO-O18, as set out below:

DO-O2 Ecology and biodiversity

To improve indigenous biological diversity and ecological resilience through:

1. *protecting areas of significant indigenous vegetation and significant habitats of indigenous fauna;*
2. *encouraging restoration of the ecological integrity of indigenous ecosystems;*
3. *enhancing the health of terrestrial and aquatic ecosystems; and*
4. *enhancing the mauri of waterbodies.*

DO-O18 Renewable energy, energy efficiency and conservation

Increase the development and use of energy from renewable sources, including on-site systems, and efficiency and conservation of energy use while avoiding, remedying or mitigating adverse effects on the environment.

75 The approach in the guideline, coupled with the limited matters of discretion and the suggestion in the guideline that resource consent applications would generally be non-notified without the involvement of third parties, could result in a situation where

Council is unable to consider effects on primary production, rural character, conflicting uses and sensitive activities, effectively undermining the intended outcomes for the Rural Zones. It is not clear from the section 32 evaluation reports nor the guidelines whether these consequences were considered when developing the guidelines and Plan provisions. This approach needs to be considered as to whether it is the most appropriate in order to achieve the Plan's objectives, and whether it gives effect to the RPS.

76 In respect of the RPS, Objective 22 sets an outcome of:

A compact well designed and sustainable regional form that has an integrated, safe and responsive transport network and:

...

(f) strategically planned rural development.

77 Policy 56, Managing development in rural areas – consideration supports this, stating:

When considering an application for a resource consent or a change, variation or review of a district plan, in rural areas (as at March 2009), particular regard shall be given to whether:

- (a) the proposal will result in a loss of productive capability of the rural area, including cumulative impacts that would reduce the potential for food and other primary production and reverse sensitivity issues for existing production activities, including extraction and distribution of aggregate minerals;*
- (b) the proposal will reduce aesthetic and open space values in rural areas between and around settlements;*
- (c) the proposal's location, design or density will minimise demand for non renewable energy resources; and*
- (d) the proposal is consistent with the relevant city or district council growth and/or development framework or strategy that addresses future rural development; or*
- (e) in the absence of such a framework or strategy, the proposal will increase pressure for public services and infrastructure beyond existing infrastructure capacity.*

78 On the face of it, the available incentive for an upper limit of double the density may not give effect to the RPS, particularly in considering the limited matters of discretion. Doubling the density and allowing for fragmentation of productive land is also considered to be inconsistent with the Council's latest direction for the District set out in the Growth Strategy.

Points system

79 The Development Incentives use a relatively complicated points system across the three focus areas of biodiversity, water quality and energy efficiency and generation. These three focus areas then have different packages within them, each with different points allocated against them which can be accrued in order to be eligible for an incentive. The guidelines then allow for top-ups to occur between the three focus areas if someone does not have sufficient points to meet the requirements for a particular incentive.

80 The points system in the guideline is complicated and complex to navigate and implement. The issues with the reliance on the point system, that if you meet certain points, you qualify for an incentive, is addressed earlier under certainty and meeting the requirements for a restricted discretionary activity. It is recommended that the points system is removed and replaced by an easier and more accessible approach.

Requirements or incentives for protecting existing indigenous vegetation when subdividing land

81 The District Plan includes rules relating to indigenous vegetation that:

- is located within ecological sites;
- is rare and threatened; vegetation species and / or
- is in or within 20m of a waterbody or the coastal marine area.

82 However, in respect of subdivision, while ECO-P2, ECO-P3 and ECO-P4 include consideration of maintenance, enhancement and protection of indigenous biodiversity, the matters of discretion for subdivision in SUB-DW-R6 do not provide clear direction for the protection of ecological sites and there are no incentives offered to do so. The matters of discretion also do not include maintenance or enhancement measures to implement the policies. There are no subdivision rules that specifically relate to rare and threatened vegetation species. The only reference to 20m of a waterbody or the coastal marine area is through the requirement to provide esplanade reserves or strips as a general condition of subdivision.

83 ECO-P2, inter alia, requires that adverse effects from subdivision on significant indigenous vegetation and significant habitats of indigenous fauna are avoided, or remedied and mitigated in order to maintain their values and characteristics, including by:

- ensuring that *subdivision* which creates *allotments* which are entirely within an *ecological site* or which necessitate *modification* of any *key indigenous tree species* or *rare and threatened vegetation species* protects the values and characteristics of those areas.
- ensuring that *subdivision* which creates boundaries that cut through any *ecological site*, or any *key indigenous tree species* or *rare and threatened vegetation species*, protects the values and characteristics of those areas.

84 ECO-P3 requires that subdivision shall be undertaken in a manner to maintain indigenous biodiversity within large areas of contiguous indigenous vegetation and riparian and coastal vegetation.

85 ECO-PR encourages the enhancement of ecological sites or rare and threatened vegetation species, where subdivision is undertaken on land containing rare and threatened vegetation species or an ecological site.

86 This approach to existing indigenous biodiversity appears to be inequitable to the development incentives for areas of new planting; with landowners with existing

established areas not obtaining any benefits for protection when they subdivide, and any benefits not being able to be considered as a matter of discretion. This does not appear to assist the Council in achieving the requirement to *maintain* indigenous biodiversity, as opposed to enhancing indigenous vegetation via the development incentives. As discussed above, *enhancement* of indigenous biodiversity is a regional council function, and it is limited to enhancing ecosystems in water bodies and coastal water.

- 87 In light of the above analysis, there appears to be a lack of any incentive to actively maintain existing areas of significant indigenous biodiversity as part of the subdivision and development process, which appears inconsistent with the direction under policies 24 and 61 of the RPS.

Review of contemporary District Plans

- 88 The following table sets out a summary of the approaches to the use of bonuses and incentives in a selection of contemporary district plans. The selection includes the plans or proposed plans of adjacent districts, and other district plans that have recently been reviewed or are currently going through a review.

District Plan	Summary of approach
Proposed Waimakariri District Plan 2021	<p>Indigenous biodiversity: There are incentives for the maintenance of existing indigenous biodiversity. 1 bonus lot or 1 bonus dwelling Applies where there is an identified SNA in the Plan, subject to requirements.</p> <p>All the criteria/standards are contained within the District Plan rules and standards.</p> <p>There are no other incentive provisions.</p>
	<p>Renewable energy</p> <ul style="list-style-type: none"> - Includes a policy promoting environmentally sustainable outcomes; but no incentives associated with it.
	<p>Freshwater – there are no incentives relating to freshwater or stormwater treatment.</p>
Operative Western Bay of Plenty District Plan	<p>Additional lots may be created using the Protection Lot rule by protecting features of significant ecological, landscape or heritage values (as identified in the District Plan). There are minimum area requirements depending if it is a significant ecological feature identified in the Planning Maps or not, and what type of feature it is.</p> <p>In the Rural Zone up to five additional lots can be created from a qualifying feature on the same site. Each lot created on site is to be a maximum of one hectare.</p>

	<p>Council also has available a transferable right provision to transfer the additional lots to another landowner. This is known as Transferable Protection Lot subdivision. These can only be transferred into a recipient property within the Lifestyle Zone.</p> <p>All the criteria/standards are contained within the District Plan rules and standards.</p> <p>The provisions focus on maintaining existing indigenous biodiversity rather than enhancement.</p> <p>There are no other relevant bonus or incentive provisions in the Plan.</p>
Operative Hamilton District Plan	There are no bonus or incentive provisions in the Plan.
Operative Auckland Unitary Plan	<p>Rural subdivision chapter includes a Land amalgamation incentivised area (around Pukekohe, Karaka), through transferable rural site subdivision. Intent is to facilitate more efficient use of land for rural production activities, transferring titles to Rural – Countryside Living Zones.</p> <p>There are no other relevant bonus or incentive provisions in the Plan.</p>
Proposed Selwyn District Plan 2020	There are no relevant bonus or incentive provisions in the Plan.
Proposed New Plymouth District Plan 2019	<p>Includes provision for one bonus allotment when subdividing if a SNA is legally protected as part of the subdivision. Subject to a number of conditions and standards.</p> <p>The focus is on the maintenance of existing indigenous biodiversity rather than enhancement.</p> <p>There are no other bonus or incentive provisions in the Plan.</p>
Proposed Porirua District Plan 2020	There are no relevant bonus or incentive provisions in the Plan.
Operative Horowhenua District Plan	There are no relevant bonus or incentive provisions in the Plan.
Proposed Central Hawke’s Bay District Plan 2021	<p>Includes bonus provisions for in-situ lifestyle sites, where there is legal and physical protection in perpetuity for SNAs, SASM and HH items. SUB-R6 – subdivision to create a conservation lot. Allows for up to two as a controlled activity, where area to be protected is over 9ha.</p> <p>All the criteria/standards are contained within the District Plan rules and standards.</p>

	<p>The focus is on the maintenance of existing indigenous biodiversity rather than enhancement.</p> <p>There are no other relevant bonus or incentive provisions in the Plan.</p>
Waipa District Plan (plan change 4)	<p>Provides for benefit lots to be created where property owners allow their land to be used for Te Ara Cycleway, or any other incentivised cycleway.</p> <p>There are no other relevant bonus or incentive provisions in the Plan.</p>
Proposed Waikato District Plan 2018/2020	<p>SUB-R50 – RDIS to create a reserve and incentive lot. The additional lot must have a minimum size of 8000m². Focus of this incentive is for the creation of reserves identified in the Council’s Parks Strategy.</p> <p>There are no other relevant bonus or incentive provisions in the Plan.</p>

89 This review identified that none of these district plans used the same approach as that currently within the ODP. At face value, all appear to be much simpler and certain to administer, and all fall within their s31 RMA functions – being the maintenance of indigenous biodiversity rather than enhancement.

90 Those plans that do include bonuses or incentives generally:

- Have rules that include criteria or standards that are to be met in order to achieve a bonus
- Are generally focused on achieving protection of existing identified SNAs (to maintain indigenous biodiversity), historic heritage items or landscape areas, rather than incentivising enhancement and restoration works.

91 Exceptions are:

- the Waipa and Waikato District Plans which seek incentives around cycleways and reserves.
- the Western Bay of Plenty District Plan which provides for bonuses where significant ecological features not identified in Planning Maps are protected.

Implementation to date

92 To date, there has been very little uptake of the development incentive provisions. Council records⁷ show that the Council has received five notices of intention, as set out in the table below.

Date lodged	Date accepted by the Council	Address	Type of incentive	Comments

⁷ As accessed in December 2021

11 April 2013	No record of acceptance	343 State Highway One, Waikanae	Planting based	No planting programme provided. Allotment now owned by NZTA.
21 March 2018	No record of acceptance	298 Ngarara Road, Waikanae	Planting based	No planting programme provided
13 May 2020	No record of acceptance	262 (or 362) Old State Highway One, Paraparaumu	Planting based	No planting programme provided
8 July 2020	No record of acceptance	192 Harakeke Road, Te Horo	Biodiversity	Does not meet minimum required planting area. Planting programme and other required information were not provided for assessment.
10 November 2020	16 March 2021	518 Mangaone South Road, Reikorangi	Water quality	Includes a Draft Planting Management Plan. Permanent retirement of plantation forestry into indigenous forest along erosion prone land. Undertakes a combination of natural regeneration and supplementary revegetation as well as enhancement planting with pest and weed control. The proposed monitoring indicators are to be achievable to successfully and the assessment will be undertaken to consider whether it meets all the requirements successfully.

93 It is apparent that there has been little uptake of the development incentive provisions to date; or at least those relating to enhancement and restoration planting. It is unclear as to why this is the case. However, feedback during a meeting held between the Council and key stakeholders in January 2022 was that the current provisions are “difficult to work with”.

Options

94 There are a number of different options that could be pursued to address the issues that have been identified with the existing development incentives approach. While the status quo would normally be considered as an option, given that the Environment Court identified that the existing District Plan provisions are ultra vires in its minutes of

31 August 2018 and 13 March 2019, it is not considered to be an appropriate or relevant option to consider further.

95 The following table sets out the issues identified through this report alongside potential options to address those. The options are not mutually exclusive.

Issue	Option(s)
1. Providing greater certainty and improving implementation	<ul style="list-style-type: none"> • Incorporating the guidelines into the rule framework (this would include removing the guideline entirely). • Incorporating most of the guidelines into the rule framework, with some guidance remaining in the appendix. • Removing the points system and replacing it with a more straightforward and certain approach, such as is used in other contemporary district plans
2. Meeting RMA requirements for restricted discretionary activities	<p>As per Issue 1</p> <ul style="list-style-type: none"> • Reviewing the matters of discretion to ensure that they appropriately reflect the intent of the incentives and address: <ul style="list-style-type: none"> ○ Ongoing protection and management ○ Maintaining rural character ○ Avoid reverse sensitivity effects and conflicts with existing activities ○ Avoiding fragmentation of rural productive land ○ Any potential consequences of the NES-F, so that they do not incentivise vegetation removal near or in wetlands ○ Enable the Council to consider positive effects. ○ Consider adding in a matter of discretion which gives greater weight to planting based initiatives in areas with unrepresented indigenous ecosystems.
3. Ensuring the guidelines are vives	<p>As above</p> <ul style="list-style-type: none"> • Removing or clarifying the non-notification clause. • Removing references to ‘development right’ to reflect the fact activities under the rule are a restricted discretionary activity, and gaining consent is not a certainty. • Removing the requirement for enhancement planting to be carried out in advance of applying for a resource consent and enabling the planting to be addressed via conditions of consent (for example via the use of bonds).
4. Presumption of non-notification	<ul style="list-style-type: none"> • Removing or clarifying the non-notification clause.

5. Changes in energy-efficiency measures	<ul style="list-style-type: none"> • Removing the energy efficiency and renewable energy generation incentives
6. Changes to the RMA / consistency with RMA functions and RPS, PNRP, NPS and NES direction and requirements	<ul style="list-style-type: none"> • Removing the incentives for stormwater treatment • Removing the incentives that allow for bonus height and building coverage in urban areas
7. Consistency within the District Plan	<ul style="list-style-type: none"> • Ensure that the matters of discretion properly reference other relevant matters, particularly relating to rural productivity and character
8. Ensuring Council is undertaking its functions and implementing the RPS	<ul style="list-style-type: none"> • Introducing new bonus provisions for the protection of existing ecological sites and other s6 matters, and potentially sites that have not been identified in the District Plan but meet the criteria for identification under ECO-P1 • Adding a new matter of discretion which provides greater weight to areas, zones or ecosystem types where there is an identified need for enhancing biodiversity • Removing the enhancement component of the incentives in favour of focusing on incentivising the maintenance of existing indigenous biodiversity • Amendments to the Plan as a whole to remove consideration of effects on aquatic biodiversity
9. Consistency with the Open Space Strategy	<ul style="list-style-type: none"> • Introducing new bonus provisions for provision of connections and linkages identified in the Open Space Strategy

96 The legal issues identified with the notices of intention could be addressed by removing these from the provisions, while recognising any existing accepted notices of intention as part of a “sunset” matter of discretion. This could still recognise areas for restoration and enhancement planting that have been subject to notices of intention, but to be secured as conditions of consent for any subdivision, should subdivision consent be granted.

Appendix A - Background

Proposed Kapiti Coast District Plan

- 1 In 2012, Kapiti Coast District Council notified its proposed District Plan (PDP). The notified PDP included Objective 2.15 which read as follows:

2.15 Incentives

To support and encourage development (including subdivision) that demonstrates a permanent net environmental benefit, in the areas of water quality, biodiversity, and energy significantly beyond the minimum levels required by this Plan.

- 2 This objective sat alongside aligned objectives 2.2 Ecology and Biodiversity and 2.20 Renewable energy, energy efficiency and conservation, which are set out below.

2.2 Ecology and biodiversity

To improve indigenous biological diversity and ecological resilience through the:

- a) protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;*
- b) encouraging restoration of the ecological integrity of important degraded environments and habitats;*
- c) enhancement of the health of terrestrial and aquatic ecosystems; and*
- d) enhancement of the mauri of waterbodies.*

2.20 Renewable energy, energy efficiency and conservation

Increase the development and use of energy from renewable sources, including on-site systems, and efficiency and conservation of energy use while protecting the natural environment and significant amenity values

- 3 These objectives were supported by policies, rules and Appendix 1 – Development Incentive Guidelines.
- 4 In summary, as set out in the Explanation, the intent of the Incentives objective and its supporting provisions was to...

The Council wishes to encourage settlement which goes beyond basic requirements or actions to avoid, remedy or mitigate the effects of a proposal to a point where a development can provide a significant shift forward or contribution to improvement to the District. It wishes to do so in four areas: increasing the biodiversity levels of the District, particularly in degraded environments; improving water quality, achieving higher levels of building energy efficiency than anything required by the Building Act and encourage use of on-site renewable energy technologies.

The Council recognises the role of development incentives in encouraging significant and permanent benefit to the natural environment with regard to biodiversity, water quality and energy use which are significant issues for the

District. The Council is prepared to consider a number of development incentives for opportunities to increase the scale of development where developments go above and beyond what is already required of them to mitigate the effects of the activity on the environment in terms of biodiversity, water quality or energy.

As well as contributing to the District's natural character and having intrinsic values, a healthy biodiversity provides us with life's essentials. Biodiversity, ecosystems and the natural environment have all come under increasing pressure from both ecological threats such as pests and development threats such as ecosystem destruction from subdivision and land use activities. The Council may consider development bonuses where the applicant has demonstrated that, for example, the restoration of degraded habitats will be undertaken which will result in a substantial net benefit with regard to biodiversity.

Directly related to biodiversity, fresh water is integral to our health, wellbeing, livelihood and culture. People value freshwater for many reasons, it helps to drive our economy, defines our natural environment and sustains ecosystems. Activities on land, can adversely affect the quality of water thereby compromising the life supporting capacity of water bodies. The Council may consider development bonuses where the applicant has demonstrated that, for example, the establishment and physical and legal protection of a riparian margin, which will result in a substantial net benefit with regard to water quality.

The Kāpiti Coast faces several major long term energy challenges, including tackling carbon emissions. There is a clear need to improve energy efficiency and conservation, and maximise the use of renewable energy resources. The path to creating a more sustainable energy future is through using energy more efficiently and generating more energy from renewable sources.. The Council may consider development bonuses where the applicant has demonstrated, that; example, using insulation higher than what is required under the Building Code in a residential development or other permanent design features, which will result in a substantial net benefit with regard to renewable electricity generation, and/or energy efficiency and conservation. This objective intends that these initiatives are permanently locked in via use of a range of legal instruments.

The exact package of incentives is likely to vary from site to site and will be determined through negotiation between landowners, developers and the Council and using Development Incentive Guidelines. In general, the requirement for applicants to exhibit a 'substantial' net benefit means that the associated enhancement must be in the vicinity of four (or more) times the outcome anticipated under the status quo. In general, the area or site to which the activity applies should also be the area or site to which the benefit and incentive will be available.

By encouraging activities to provide a significant and permanent benefit to the natural environment in terms of biodiversity, water quality and energy by offering increased scales of development the objective gives effect to section

6 of the RMA which requires the Council to recognise and provide for the preservation of the natural character of wetlands, lakes and rivers, and their margins, and the protection of them from inappropriate use, subdivision and development as a matter of national importance. The Act also requires the Council to provide for the protection of significant indigenous vegetation and significant habitats of indigenous fauna. In addition, a function of District Councils under the Act is the control of any effects of the use, development, or protection of land, for the purpose of maintaining indigenous biological diversity. The benefits to be derived from the use and development of renewable energy must be had regard to by the Council under the Act RMA and the Council must give effect to the National Policy Statement for Renewable Electricity Generation. The Objective also gives effect to the New Zealand Coastal Policy Statement with regard to the restoration of degraded coastal habitats.

Hearings Panel Decision

- 5 The Objective and supporting provisions were subject to submission. The Hearings Panel decision amended Objective 2.15 to become a new District Wide Policy DW-18. As amended in response to submissions, it was also reworded to read:

Policy DW18 – Incentives

To support and encourage development (including subdivision) that demonstrates a permanent net environmental benefit, in the areas of water quality, biodiversity, and renewable energy, and energy efficiency, significantly beyond the minimum levels required by this Plan.

Postscript (29 September 2022) – Updated information about lodged notices of intention

In pages 22 and 23 of this document, a table lists the notices of intention lodged with Council under the existing development incentive provisions. This list was supplied to iwi and a range of stakeholders in June 2022. This led to two further notices of intention being brought to our attention, which had been lodged in 2014 and 2018. Additionally, a further notice was lodged in July 2022. At the time of writing, Council has not accepted any of these three notices of intention.

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